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ADVERSARY POSSESSION, OR THE OPEN QUESTION IN VIRGINIA.

I have read with great interest the able and interesting articles of Mr. H. C. McDowell, Jr., in the March number, and of Mr. Raleigh C. Minor, in the April number of the REGISTER, on Adversary Possession, and I desire to contribute the following to the discussion.

As stated in *Stull* v. *Rich Patch Co.*, 92 Va. 281–2, the open question in Virginia on adversary possession is this:

"Does the adverse possession of a claimant under a junior title extend to his whole tract, or only to the extent of his enclosures, where there are conflicting grants or deeds of land causing an interlock; the claimant under the elder title being in actual possession of a part of his land outside of the interlock, when the claimant under the junior title entered upon and took actual possession of a part of the interlock, claiming title to the whole extent of his boundary?"

We will, for the present, assume it to be settled that, at common law, the answer to this question would be: The adverse possession of the claimant under the junior title extends only to the extent of his enclosures.

But, Mr. Minor suggests:

"It seems by no means certain that the Virginia statute does not reverse the rule."

He then proceeds to demonstrate that the statute should be construed as if it read:

"In controversies affecting real estate, possession of part *of the land in dispute* shall not be construed as possession of the whole of such land, where actual adverse possession thereof can be proved;"

and that the corollary to be drawn therefrom should read:

"Possession of part *of the land in dispute* shall be construed as possession of the whole of such land, where no actual adverse possession is proved."

If it is meant by this that the senior title holder must have a *pedis positio* of the land *in dispute* before he can be considered in possession

thereof, it is believed that this construction of the statute is erroneous, as will hereinafter more particularly appear.

But, aside from this, Mr. Minor makes the following deduction:

"Applying the corollary in this form it is at once seen that the junior's possession of part of the interlock must be construed as possession of the whole, where no actual adverse possession thereof is proved."

It is submitted that this conclusion does not follow. It cannot follow, unless the words of the statute, "possession of a part," can be read as applying to the junior as well as to the senior claimant. Merely to confine the application of the statute to the land *in dispute* is not sufficient to warrant the above deduction.

Mr. McDowell, in the extract from his article quoted by Mr. Minor (pp. 843–4 Va. Law Register), takes the position that the words, "possession of a part," apply only to the possession of the senior title holder.

I do not understand that Mr. Minor assails this position; but, as the determination of whether it be well or ill taken is most important in arriving at a correct conclusion of the matter in hand, it may be worth while to consider it briefly, but as critically and carefully as we can.

In the first place, it is supposed to be a matter beyond question that the words, "possession of a part," in the statute (sec. 2740, Code Va. 1887) *do* apply to the possession of the senior title holder or rightful owner. The only matter which seems to be open for discussion is, whether these words may not *also* apply to the junior title holder, or disseisor of the rightful owner.

If we ascertain the meaning of the words, "adverse possession," used in the closing part of the statute, we shall have therein sufficient data to determine, with certainty, whether the junior title holder may also be referred to in the preceding part of the statute.

The words "adverse possession" have a well settled and definite meaning in the law. In the light of this meaning the statute must be read.

"By an adverse possession is to be understood one dependent upon an adverse and conflicting title, grounded upon an ouster or dispossession of the *rightful owner*, which in case of a freehold is known as a *disseisin*. Littleton defines a disseisin (3 Th. Co. Lit. 5) to be 'where a man entereth into any lands or tenements, *when his entry is not congeable* (lawful) *and ousteth him that hath the freehold.*'" 2 Minor's Inst. (3d ed.) 573.

Littleton in sec. 279 says:

"Every entry is no disseisin, unless there be an ouster of the freehold."

Co. Lit., 153 b, also says:

"Disseisin is putting a man out of the seisin, and *ever implies a wrong.*"

Hence only the possession of a wrong-doer—a disseisor of the rightful owner—can be regarded as an "adverse possession."

The possession of the senior title holder, or rightful owner, can never be regarded as "adverse possession."

Therefore, the words "adverse possession" in the statute can and do, at all times, refer *only* to the possession of the junior title holder or disseisor.

Hence, it follows as an inevitable conclusion that the words "possession of a part," in the statute, can and do, at all times, refer *only* to the possession of the senior title holder or rightful owner.

This must be so, for it would be a *reductio ad absurdum* to say that the statute, in any case, could be construed as if it read:

"In controversies affecting real estate, possession of part of the land *in dispute* by the 'junior' title holder, or disseisor, shall not be construed as possession of the whole of such land, where an actual adverse possession thereof by the 'junior' title holder or disseisor can be proved."

Leaving out of consideration for the present, then, the question of whether the statute should be construed as if the words suggested by Mr. Minor, "land in dispute," were inserted, we reach this conclusion, namely, the statute should be construed as if it read:

"In controversies affecting real estate, possession of part . . . by the 'senior' title holder, or rightful owner, shall not be construed as possession of the whole of such land, where an actual adverse possession thereof by the 'junior' title holder or disseisor can be proved."

Such is the conclusion reached from a mere analysis of the language of the statute.

Let us see what conclusion may be reached from a consideration of "the law as it was aforetime," and the necessity of the statute, which may be taken to have been the reason for its enactment.

But before going into the consideration of these matters it may be well to define the meaning with which certain words will be used.

"Seisin" signifies, in its common law meaning, the same thing as "possession," when applied to a freehold. 3 Tho. Co. Lit. 274.

There are two kinds of "seisin" or "possession" of a freehold, known to the common law, and *two only:* Seisin (or possession) *in law,* which is a mere right to the possession; seisin (or possession) *in fact* (or deed), which is an actual seisin (or actual possession). 1 Tho. Co. Lit. 558, 574; 2 Id. 334, and n. C. 335 to 338.

What is characterized in modern times as "constructive possession" was in no way distinguished by the common law from seisin in fact (or in deed), or actual seisin, or actual possession.

With these definitions we will now proceed with the consideration of the matter in hand.

At common law, if a man, by one title, owned lands, of whatever quantity, or in howsoever many parcels separated, and had *pedis positio* of any part, or of any part of any parcel thereof, he was seised in fact—had actual seisin (actual possession)—of the whole of such land and every parcel thereof within the county of his *pedis positio*.

"If a man will make feoffment, by deed or without deed, of lands or tenements which he hath in divers towns in one county, the livery of seisin made in one parcel of the tenements in one town, in the name of all the rest, is sufficient for all the lands and tenements comprehended within the same feoffment in all the other towns in the same county." 2 Tho. Co. Lit. 337, quoting Littleton, sec. 61, 50 a.

The holder of such a title had *actual possession* of the *whole* of the land or *none*. If he had *pedis positio* upon only a small part, he was yet in actual possession of the whole.

Again:

"If a man have cause of entry into any lands or tenements in divers towns in one same county, if he enter into one parcel of the lands or tenements which are in one town in the name of all the lands or tenements into which he hath right to enter within all the towns of the same county: by such entry he shall have as good a possession and seisin of all the lands or tenements whereof he hath title of entry, as if he hath entered in deed into every parcel." 2 Tho. Co. Lit. 16, quoting Littleton, sec. 417, 252 a.

Such was the *actual seisin* or *possession* given by the common law to the senior title holder or rightful owner. And this actual possession extended to the *whole* of the land, when the latter had *pedis positio* of only a part thereof, although a wrongful claimant might afterwards enter upon some other part of such land and acquire *pedis positio* of such part. Unless the senior title holder was dispossessed of every part of the land covered by his title, his seisin in deed (or in fact), or *actual possession*, was not disturbed even by the *pedis positio* of the wrongful claimant.

"If A of B be seised of a mese, and F of G, that no right hath to enter into the same mese, claiming the said mese to hold to him and his heirs, entereth into the said mese, but the same A of B is then continually abiding in the same mese: in this case the possession of the freehold shall always be adjudged in A of B, and not in F of G, because in such case when two be in one house or other tenements, and one claimeth by one title and the other by another title, the law shall

adjudge him in possession that hath right to have possession of the same tenements." 2 Tho. Co. Lit. 299, quoting Littleton, sec. 701, 368 a.

In other words, the common law gave to the senior title holder, who had *pedis positio* upon his land, however limited in extent, *exclusive actual possession* of the *whole*, and so considered such possession for all purposes whatsoever. In modern times the latter is denominated "constructive possession," but the common law gave to it the same effect in all respects as to the *pedis positio*. That is to say, this constructive possession of the senior title holder was the same possession that he would have had if he had had *pedis positio* of the whole land. 3 Tho. Co. Lit. 5 and n.; 4 Kent's Com. 482; 2 Bl. Com. 312; 3 Id. 170, 174, 175; 4 Cruise's Dig., ch. IV, sec. 9; Littleton, sec. 417; 252 a; 1 Rob. (old) Pr. 449; *Green* v. *Liter*, 8 Cranch, 250.

"Disseisin" was an ouster and dispossession of the senior title holder from all actual seisin, *i. e.*, from every part of the land covered by his title, and an usurpation of the feudal tenure. If the senior title holder was left with any *pedis positio* on any part of the land, he was not disseised, even as to any other part of the land on which the junior title holder might himself have acquired a *pedis positio*. 4 Kent's Com. 482; 3 Tho. Co. Lit., 5 and n. E; see, also, the celebrated opinion of Lord Mansfield in *Taylor* v. *Horde*, 2 Smith's Lead. Cas. (4th Am. ed., Hare & Wallace), 414 to 464.

A further common law reason for this rule seems patent. Mere dispossession was not sufficient to work a disseisin. There could be no divided investiture of the feudal tenure, and anciently the consent of the lord was necessary to the admission of a tenant into the feud. This was never given to the junior title holder so long as the senior title holder had *pedis positio* of any part of the land covered by his title. 3 Tho. Co. Lit. 5, 6, and n. E; 3 Bl. Com. 171.

It may be also noted that, in the correct and accurate use of the term "disseisin," it could never occur in any case unless the senior title holder had seisin in fact of his land at the time of the disseisin. "Disseisin" always imported and required a seisin in fact by the senior title holder, which was necessarily also a prior seisin. "A disseisin is a wrongful putting out of him that is *actually* seised of a freehold." 3 Tho. Co. Lit. 2.

If the senior title holder had a mere legal seisin—the land being vacant—he could not be "disseised." A junior title holder who should enter upon such land was anciently and accurately "no disseisor." The ouster accomplished by such an entry was, at common

law, an "abatement" or "intrusion." 3 Tho. Co. Lit. 1, 2; 3 Bl. Com. 168.

But in time this distinction between "disseisin" and "abatement" or "intrusion" was lost sight of—as was, indeed, to be expected, inasmuch as the distinction was not important so long as the likeness of each in their beginning was remembered. In both the acquisition of title consisted in the wrongful holding of the possession for the prescriptive period, and not in the different manner of the beginning of such possession. It is important, therefore, to remember that the beginning of "disseisin," "abatement" and "intrusion" was alike in this: None of them could begin, at common law, so long as the senior title holder had *pedis positio* of any part of his land. In the first, the rightful owner had to be put out of his actual seisin, so that he no longer had any *pedis positio* upon his land; in the other two, the land had to be found vacant—with no *pedis positio* of the rightful owner thereon—before the wrongful holding could begin.

Aside from this difference in the beginning of a disseisin from those of an abatement or intrusion, they differ not at all in the character of *holding of possession* thereafter necessary to ripen title. In this they are all alike; and they are also, in this, precisely alike the case where the beginning of the wrongful seisin is by "deforcement." (In the latter case the tenant is in, in the beginning, lawfully, but the retention of the possession is unlawful.)

Deforcement "in its most extensive sense is *nomen generalissimum;* it then signifying the holding of any lands or tenements to which another person has the right. So that it includes as well an abatement, an intrusion or disseisin . . . as any other species of wrong whatsoever, whereby he that hath right to the freehold is kept out of the possession." 3 Black. Com. 172.

The holding under a deforcement must have been of such an exclusive character and extent that "either the entry of the rightful owner is taken away, or the deforceor holdeth it so fast as the right owner is driven to his real *praecipe*, wherein it is said, *unde A. eum injusté deforceat*, or the deforceor so disturbeth the right owner, as he cannot enjoy his own." 3 Tho. Co. Lit. 3, citing Bract. lib. 4 fol. 238, and Fleta lib. 5, cap. ii.

The same character and extent of actual adverse holding is, therefore, necessary, to acquire title by adverse possession begun by disseisin of the true owner.

It is therefore manifest that, at common law, the senior title holder,

who had *pedis positio* on any part of the land covered by his title, had *actual possession* of the *whole*, just as if he had the whole enclosed, any subsequent *pedis positio* by another notwithstanding.

Hence it is immaterial where this *pedis positio* of the senior title holder is, so it be on the land covered by his title in question. Wherever it is on such land, he was at common law in actual possession of *all* of his land, although some other part of it might be *in dispute*. The mere fact that some one *disputed* the title to *part* of his land did not change the character of his possession of the *whole*. We have seen that even a hostile *pedis positio* with claim of title could not do this, *a fortiori* a mere claim of title or *dispute* could not.

Thus and so firmly established was the rule at common law that possession by the senior, or rightful owner, of any part of the land covered by his title in question, was construed to be possession of the whole of such land—that *in dispute* as well as that not in dispute

We may readily apprehend that such a rule was adverse to the true policy of a new and unsettled country. In such a country every couragement should be given to *actual* settlers, and its true policy would be opposed to any constructive possession which discouraged *actual* clearing, cultivation and settlement.

The reason, therefore, for the enactment of our statute (1 Rev. Code 1819, p. 510, sec. 89; Code Va. 1887, sec. 2740) is evident.

The statute was enacted to *restrict* the operation of the constructive possession given by the common law to the senior title holder. It was not meant, as we have seen, to *give* any constructive possession to any one. The policy of our State, in its then condition, was opposed to constructive possession in one as much as in another. The statute, therefore, *restricted* the operation of said constructive possession of the senior title holder in so far as it might have otherwise over-ridden the *pedis positio* of the *actual* settler, but no further.

It is therefore submitted for the consideration of the profession that our statute should be construed as if it read:

"In controversies affecting real estate, possession of part *of the land covered by his title in question, by the 'senior' title holder or rightful owner*, shall not be construed as possession of the whole of such land, when actual adverse possession *of another part* thereof, *by a 'junior' title holder, or disseisor of the rightful owner*, can be proved."

And the corollary to be drawn from it:

"Possession of part *of the land covered by his title in question, by the 'senio title holder or rightful owner*, shall be construed as possession of the whole of such and, when no actual adverse possession *of any other part* thereof *by a 'junior' title holder or disseisor of the rightful owner* is proved."

That is to say, the true owner's constructive possession stands as at common law, when there is no actual adverse possession in the case. This we know to be true.

Mr. Minor's corollary would require the true owner to have a *pedis positio* on the land *in dispute* before he could be construed as having possession thereof, although there be no actual adverse possession of any part of the land in dispute. This we know cannot be law. *Koiner* v. *Rankin*, 11 Grat. 426 to 428.

It would seem therefore, both from a consideration of the Virginia statute and of the common law, that the answer to the "open question in Virginia" will be: The junior title holder is confined to his *pedis positio*.

At another time the writer may still further trespass upon the indulgence of the profession and of the editor of THE REGISTER, with a consideration of the common law origin of "constructive" possession; of the reason for its never being given to a "disseisor;" and of the decisions in Virginia and elsewhere, giving constructive possession in certain cases; all of which, so far from being founded upon principles antagonistic to the solution ventured above of the "open question in Virginia," are, it is believed, when rightly considered, conclusive in its support.

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ADVERSARY POSSESSION.

(A REJOINDER.)

The reply of Mr. Raleigh C. Minor (3 Va. Law Reg. 843) to the article in the March number (*Ibid* 763) is interesting and extremely ingenious.

In attempting a rejoinder the writer will suggest, but not elaborate, some possible objections to the construction of the statute on adversary possession proposed by Mr. Minor.

This statute (Code, sec. 2740) Mr. Minor would read, paraphrased, as follows:

"Possession of part [of the interlock] shall be construed as possession of all thereof, when no actual adverse possession [of any part of the interlock] can be proved."

And he would apply the words "possession of part" to either the senior or the junior grantee.

The statute thus construed is capable of two readings: